

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition to Establish Procedural	)	WC Docket No. 07-267
Requirements to Govern Proceedings For	)	
Forbearance Under Section 10 of the	)	
Communications Act of 1934, as Amended	)	

**COMMENTS OF DELTACOM, INC.**

Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") released on November 30, 2007 (FCC 07-202), DeltaCom, Inc. hereby submits these comments in the above-captioned docket. The Commission seeks comment on whether to adopt procedural rules to govern the conduct of proceedings initiated by petitions for forbearance filed pursuant to Section 10 and/or Section 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 160, 332. Specifically, the NPRM addresses a petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. ("Petitioners") on September 19, 2007. Deltacom strongly supports the Petitioners' request for the immediate adoption of procedural rules for the Commission's consideration of forbearance petitions.

Deltacom is a facilities-based competitive local exchange carrier headquartered in Huntsville, Alabama, that provides integrated telecommunications and technology services to businesses and consumers in the southeastern United States. In conjunction

with its affiliates, Deltacom has a fiber optic network spanning approximately 14,500 route miles, including more than 11,000 route miles of owned-fiber, and offers a comprehensive suite of voice and data communications services, including local, long distance, broadband data communications, Internet connectivity, and customer premise equipment to end-user customers. Deltacom is one of the largest competitive telecommunications providers in its primary eight-state region, situated in the legacy-BellSouth territory. Because forbearance proceedings can yield such sweeping and unpredictable results, Deltacom has felt compelled to expend resources to participate in proceedings concerning markets that are not in its local service territory.

Through Sections 10 and 332, Congress charged the FCC with a remarkable power – the ability to eliminate portions of the very law that the Commission is responsible for implementing, a function normally reserved to Congress itself. In the words of Peter Parker’s uncle, “with great power, comes great responsibility.” Until now, however, the Commission wielded this statutory eraser in an *ad hoc* mosh pit, where those with the greatest resources to churn out forbearance petitions crash around, dictating the Commission’s agenda and, ultimately, national telecommunications policy. According to the Petitioners, no fewer than 15 forbearance petitions are pending before the Commission today. *Petition at 6*. The one-year statutory clock ticks on each of these jack-in-the-box petitions, and the Commission’s failure to act within the statutory

deadline would result in the petition springing out “deemed granted” without so much as an order to review or appeal.<sup>1</sup>

Failure to Implement Procedural Rules is Manifestly Unfair to Interested Parties.

Without basic procedural rules, interested parties are at a distinct disadvantage vis-à-vis a petitioner. Forbearance petitions are neither strictly rulemakings nor complaints; there are no established pleading cycles for dealing with dispositive motions; and they are not assigned to an Administrative Law Judge who can issue quick interlocutory decisions. The Commission has virtually no rules pertaining to the conduct of forbearance proceedings, in which fundamental policy decisions are more frequently being made. As enacted, Section 10 creates a truncated process whereby any telecommunications carrier may submit (multiple) petitions to the Commission requesting that the Commission forbear from exercising its authority with respect to that carrier or class of carriers. If the Commission fails to act within a one-year period from the date the petition is received, or within a one-time, Commission-granted 90-day extension, the petition will be deemed granted. 47 U.S.C. § 160(c).

Procedural rules would provide a framework for meaningful participation in the Commission’s deliberative processes. Absent such rules, forbearance proceedings invite abuse by petitioners and allow too few checks on the agency’s discretion. Instead of denying petitions filed with insufficient empirical evidence to satisfy petitioner’s burden of proof, the Commission has granted petitions relying on substantive evidence that was

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<sup>1</sup> *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007), *appeal pending*, *Verizon v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

filed near the statutory deadline, which does not provide interested parties sufficient opportunity to scrutinize and respond to it.<sup>2</sup> Although a petition is defective as filed, the Commission has repeatedly requested that petitioners supplement their forbearance petitions.<sup>3</sup> The fact that the Commission and the Bureau are willing not only to accept but also to *request* critical information of a petitioner late in the statutory shot-clock incents petitioners to file less-than-complete petitions so as to preclude a thorough examination of the evidence upon which the Commission relies. Such last minute data dumps create, at the very least, the appearance of unfairness and impropriety.

Regardless of their outcome, forbearance petitions seem to multiply like rabbits. On the one hand, a petition that is granted on its “merits” or is deemed granted all but guarantees a flurry of “me too” petitions. On the other, a denied forbearance petition may be warmed-over and refilled, perhaps covering another jurisdiction<sup>4</sup> or type of service. The sheer volume and scope of petitioner-defined forbearance petitions (which sometimes address the very issues that are the subject of pending rulemakings) consume the Commission’s and competitive carriers’ constrained resources and can set far-

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<sup>2</sup> See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, n. 167 and 171 (2005) (The Commission supported its September 16, 2005 Order with an August 22, 2005 letter from Cox Communications for the grant of forbearance to Qwest Communications in Omaha).

<sup>3</sup> See, e.g., Letter from John Nakahata *et al.*, Counsel for General Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (Oct. 24, 2006) (providing information in response to a request from the Competition Policy Division, Wireline Competition Bureau); Letter from John Nakahata *et al.*, Counsel for General Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 (July 12, 2006) (providing information in response to a request from the Competition Policy Division, Wireline Competition Bureau); Letter from J.G. Harrington, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (June 30, 2005) (submitting responses to questions from Commission staff).

<sup>4</sup> After Verizon’s failed bid for unbundling relief in six other MSAs, WC Docket 06-172, Verizon recently submitted yet another petition seeking forbearance of its unbundling obligations, creeping this time into Rhode Island. See, Public Notice, *Pleading Cycle Established for Comments on Verizon New England’s Petition for Forbearance in Rhode Island*, WC Docket No. 08-24, DA 08-469 (February 28, 2007).

reaching precedent without adhering to the rules of the Administrative Procedures Act, 5 U.S.C. § 553, that are designed to ensure fairness and transparency of agency proceedings and decisions.

The FCC Should Adopt Rules that Provide Interested Parties A Meaningful Opportunity to Participate in Forbearance Proceedings

Procedures that afford other carriers, state and federal agencies, consumer groups and other industry parties a meaningful opportunity to participate in agency proceedings are the blueprints of reasoned, open regulatory decision-making.

To allow interested parties time to review and rebut all relevant evidence, the Commission should adopt a complete-as-filed rule for forbearance petitions and permit petitioners a limited window to cure only non-substantive defects. Petitions should clearly set forth the relief requested and should not be substantively amended once filed. As detailed by the Petitioners, the Commission recognizes the benefits of what approximates a complete-as-filed requirement for streamlined proceedings, such as Section 271 applications and formal complaints filed pursuant to Sections 208 and 271(d)(6). *Petition at 14.*

Because of the compressed timeframe for an FCC decision, forbearance petitions should set forth the grounds for and the facts forming the basis of the requested relief with particularity. For the sake of administrative efficiency, a petition should be treated more like a code pleading than a notice pleading. Since there is no “statute of limitations” for forbearance, petitioners would not be unfairly burdened or otherwise prejudiced by complying with strict procedural rules in order to obtain the extraordinary

and expedited relief sought under Section 10, with its unique default provision granting relief when the Commission fails to rule timely.

Indeed, carriers who either do not wish to or cannot satisfy the more stringent procedural rules proposed herein can still seek relief from the application of Commission rules by availing themselves of the waiver process. Strict procedural requirements should divide these two alternate paths to similar relief – the elimination of rules in instances where they are demonstrably unnecessary. Such implementation of Section 10 would give effect to congressional intent as expressed by members of Congress: “It was understood that this would be judiciously used to address acute problems – it should not be used to remove administrative laws processes and protections.”<sup>5</sup>

Additionally, the Commission should squarely place the burden of proof and persuasion on the petitioner. The petitioner must demonstrate that forbearance will clearly promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications service. 47 U.S.C. § 160(b). Such a showing should not be based on predictive judgment but on evidence of actual competition, particularly where Section 251(c) and Section 271 unbundling obligations are involved.

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<sup>5</sup> See Letter of Senators Bryon L. Dorgan, Daniel K. Inouye, John F. Kerry, John D. Rockefeller IV, Ron Wyden, Amy Klobuchar, to the Honorable Kevin J. Martin, Chairman, FCC, dated Nov. 20, 2007.

When an ILEC Seeks Forbearance Relief from its Sections 251 and/or 271 Obligations, the FCC Should Have Additional Requirements

Sections 251(c)(3) and 271 impose certain unbundling and pricing obligations for network elements on incumbent local exchange carriers. Relief from section 251(c)(3) obligations is already available to incumbent LECs in the form of the criteria for determinations of non-impairment for carriers requesting access to unbundled network elements at cost-based rates. Consequently, additional requirements are warranted.

When an incumbent local exchange carrier seeks Section 10 forbearance relief from its obligations under Section 251 and/or Section 271, it should seek and submit from the public utility commission in each affected state an assessment of the potential impact that a grant of its forbearance request would have. This assessment should be submitted with the forbearance petition when filed. Because it's close to the source, State government is best suited to provide probative information concerning the markets at issue and has a strong interest in protecting the consumers in that State. If a State regulatory commission fails to open a proceeding to make a written assessment in a reasonable time, say within six months of the incumbent LEC's completed request for such an assessment, then the incumbent LEC should be permitted to submit its own assessment in the alternative.

The Commission has implemented similar rules requiring impact assessments and/or government input in a number of contexts. For example, before processing an application for wireless tower siting, the Commission requires requesting entities to submit an assessment of the effect the tower will have on properties of historical

significance as well as its environmental impact.<sup>6</sup> Also, to obtain Section 271 authority to provide interLATA telecommunications service, a Regional Bell Operating Company ("RBOC") had to submit State determinations on their application.

For the foregoing reasons, the Commission should promptly fill the procedural void in Sections 10 and 332 by adopting rules to govern the conduct of forbearance proceedings consistent with the views presented herein.

Respectfully submitted,

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<sup>6</sup> See 47 C.F.R. §§ 1.1301 to 1.13197.